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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 511

FAYE M. BARRAS, et al.,
Petitioners

v.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona corporation,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona corporation,

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This Respondent, Salt River Valley Water Users' Association, prays that writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cause on July 5, 1957.

Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported, but is appended to the Petition.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C.A. 1291.

Statute Involved

29 U.S.C.A., Sec. 203 (a):

QUESTION PRESENTED

Petitioners have incorrectly stated the question presented. The facts therein assumed are contrary to the express findings of the District Court.

The question presented is:

Whether the wives of employees of the employer in interstate commerce are considered to be employed under the definitions of the Fair Labor Standards Act of 1937, as amended, where:

(a) The plan and method of operation of employer was designed with the reasonable expectation that the duties assigned to the husband would be performed by him without assistance, and the duties so assigned could in fact be efficiently performed by him without assistance;

(b) No agreement of employment was made between the wives and the employer. They were not carried on the employer's pay roll, nor were wives of the particular group of employees classified as employees under the collective bargaining agreement between the union, representing all employees, and the employer;

(c) Some of the duties assigned to the husband could as well be performed by the wife as the husband, and the wife voluntarily performed some of the duties assigned to the husband without the knowledge of the employer and without expectation on the part of either the husband or the wife at the time the services were performed that the wife would be compensated therefor, other than the compensation paid to the husband;

(d) The plan and method of operation of the employer was such that little or no supervision could be exercised over the husband. The employer made no effort to control the time or the activities of the wife either directly, or indirectly through the husband.

STATEMENT OF THE CASE

Petitioners brought an action in the District Court alleging that they were employees of Respondent, Salt River Valley Water Users' Association; that Respondent had failed to compensate them in accordance with the Fair Labor Standards Act, or at all. Respondent answered, denying the employee relationship; denying that any work was performed by Petitioners for Respondent, that if in fact Petitioners did perform any work for Respondent, it was without its knowledge or consent and was voluntarily done by Petitioners.

Respondent, Salt River Valley Water Users' Association, delivers irrigation water to member lands consisting of some 240,000 acres. These waters are collected in various storage dams, diverted into canals, and distributed to lands through laterals and ditches. The area served by Respondent was divided into sixty-two divisions, each in charge of an employee of Respondent classified as a "zanjero". It was his responsibility to see that the water was delivered to the user in such quantities and at such times as the user might order. The duties of a zanjero generally consist of receiving orders for water, either by telephone or by such orders being left at his home. Orders for water received prior to a specified hour would be scheduled for delivery the following day, commencing at various ti . The zanjero then releases water from the main canal into latera. leading to various farms, and allowed to run for the number of hours ordered. At the end of the day he forwards by mail to the central office a report on a standard form, showing the number of water "turn-ons" and quantities of water ordered. This report is used by Respondent to compute the water charges, also the time of the zanjero, including any time shown by the report to have been worked other than for routine duties. A zanjero was required to live at a station, but was not required to be married although most of them were. At these stations Respondent had supplied telephones, to be used for the purpose of receiving and transmitting orders, being also available to the zanjero and his family for his and their personal and business uses. At each station

there was some office equipment, together with office files and supplies such as reporting cards.

Petitioners are wives of a group of Respondent's employees classified as "zanjeros". Concededly there was no express agreement of employment. The usual indicia of employment is entirely absent. In no instance did any of the Petitioners apply for employment. None were carried on Respondent's pay roll. Local 266, International Brotherhood of Electrical Workers A.F.L. was certified in 1941 by the National Labor Relations Board as the collective bargaining agent of all employees of Respondent. Zanjero wives were not included in any classification. With the exception of two or three, all zanjeros were members of the union (R.339). The agreements between the union and Respondent, arrived at by collective bargaining, renewed year after year, made no reference to or classified zanjero wives as employees (plaintiff's Exhibit 45; R. 289, et seq.). No contention was made by the union in any negotiations with Respondent that zanjero wives should be classified as employees (R.340-341). No demand was ever made by any of the Petitioners for payment of compensation, until this action was filed (R.51).

The complaint was grounded upon the theory that Respondent's plan and method of operation were so designated as to require the wife or other member of the family of the zanjero to aid and assist him in the performance of his duties; thus the complaint alleged that the zanjero could not perform his assigned duties without the aid and assistance of the wife; that Respondent expected wives to assist in the performance of such duties; that Respondent would employ only married men as zanjeros and instructed or required the husbands to instruct the wives in the manner of performance of their duties. This is the theory upon which the case was tried in the lower court. This is the theory upon which it was presented to the Court of Appeals and the theory upon which Petitioners have presented the petition for certiorari.

The District Court made findings of fact, approved by the Court of Appeals, contrary to the contentions of Petitioners. In essence,

these findings were that the zanjero could efficiently perform the duties assigned to him without assistance of the wife or other members of the family. That Respondent exercised no control over petitioners with respect to the manner in which they used their time or with respect to their activities that they were at liberty to, and did, leave the premises at any time they so desired. Some wives of zanjeros, with or without Respondent's knowledge or objection, were regularly employed full time by persons other than Respondent; that many wives of zanjeros did not aid or assist their husbands at any time in the performance of their assigned duties, and in other cases the husband induced the wife to assist him in varying degrees. That any work performed by petitioners was done so voluntarily and without the knowledge of Respondent. The District Court concluded that Petitioners were not employees of Respondent, and rendered judgment accordingly. The Court of Appeals affirmed.

REASONS WHY WRIT SHOULD NOT BE GRANTED

I. IN RENDERING JUDGMENT AGAINST PETITIONERS THE LOWER COURTS FOLLOWED THE PRINCIPLES OF LAW ENUNCIATED BY THIS COURT IN CONSTRUING THE FAIR LABOR STANDARDS ACT. THE DECISION OF THE NINTH CIRCUIT COURT IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF OTHER COURTS OF APPEAL. NO SPECIFIC OR IMPORTANT REASONS EXIST FOR GRANTING CERTIORARI.

II. (a) FINDINGS OF FACT BY THE DISTRICT COURT ARE AMPLY SUPPORTED BY THE EVIDENCE AND THEREFORE NOT CLEARLY ERRONEOUS.

(b) IN FINAL ANALYSIS A QUESTION OF FACT ONLY IS PRESENTED. PETITIONERS SEEK A REVIEW BY THIS COURT OF THE EVIDENCE UPON WHICH THE FINDINGS OF THE LOWER COURT ARE BASED. THIS DOES NOT ACCORD WITH THE RULES OR DECISION OF THIS COURT.

ARGUMENT

I

Petitioners assert that the decision of the Ninth Circuit Court in this case is in direct conflict with the decisions of other Courts of Appeal, namely, the Fourth Circuit, as disclosed by *McComb v. Homeworkers' Handicraft*, 176 F. 2d 633, and of the Eighth Circuit as reflected in *Tobin v. Anthony-Williams Manufacturing Company*, 196 F. 2d 547, both being predicated on *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S. Ct. 1473, 91 L. Ed. 1772. We do not so read these decisions.

Petitioners interpret these cases as holding that an employee is one whose work is "a part of the integrated unit of production". With this interpretation we agree. We also agree that under the evidence in these cases the decisions were correct. Petitioners here grounded their cause of action on the principle announced in these decisions. The usual indicia of employment being entirely absent when tested either under common law rules or principles applied by this Court in construing the act, petitioners alleged and endeavored to establish employment by proving a pattern, namely that under the plan and method of operation of Respondent, duties assigned to a zanjero could not be performed without assistance; that such fact was known by Respondent and that in designing the plan of operation it contemplated and expected that the zanjero would secure such needed assistance from his wife or other members of his family. Upon this hypothesis it was claimed the wife's work was but a part of the integrated unit of production. Their suit failed for lack of proof.

Merely showing that some wives did at times assist their husbands in the performance of assigned duties, without further proof of the necessity therefor, would not be sufficient. If a wife did some work which the husband could and should have done, and for which he was paid, then her work was not necessary and would be of no benefit to the employer. Under ordinary circumstances, proof that one person did not work would not be competent to prove that another person did not work. But here, where the work to be

performed on sixty-two zanjero divisions is substantially equal[1] proof that in a large number of those divisions the husband could and did efficiently perform all of the duties assigned, without any aid or assistance from the wife, would be competent to show the lack of necessity for assistance in any other division (R. 330, et seq.). Proof that some divisions were operated by a zanjero without a family (R. 160-163-421) and that some wives of plaintiffs in the companion case held full time jobs away from the division and for other persons (R. 418),[2] is surely competent to prove that the husband could and did perform the assigned duties without assistance and that the aid of any wife was voluntarily induced and was of no benefit to the employer.

The findings of the Court on these questions were against Petitioners; the findings are amply supported by the evidence. Judgment went against Petitioners not because the Court failed to apply correct principles of law, but because of the failure of proof.

Petitioners argue that "the lower courts' decisions herein will open the way for a raft of new decisions which will permit employers by the assignment of work to require the wives and even the families of employees to work without compensation". This Court fully answered Petitioners' argument in *Walling v. Portland Terminal Co.*, 67 S. Ct. 639, 330 U.S. 148, wherein it is stated:

> "Accepting the unchallenged findings here that the railroads receive no 'immediate advantage' from any work done by the trainees, we hold that they are not employees within the act's meaning. We have not ignored the argument that such a holding may open up a way for evasion of the law. But there are neither findings nor charges here that these arrangements were either conceived or carried out in such a way as to violate either the letter or the spirit of the minimum wage law. We therefore

[1] The collective bargaining agreement (Plaintiffs Ex. 45, R. 317) discloses that the guaranteed weekly wage was the same for all except four divisions, one of which was $49.00 and three $41.00.

[2] No attempt is made here to make record reference to all of the testimony bearing upon these points.

have no case before us in which an employee has evasively accepted the services of beginners at pay less than the legal minimum without having obtained permits from the Administrator. It will be time enough to pass upon such evasions when it is contended that they have occurred."

It is submitted that there are no specific or important reasons warranting the issuance of certiorari. *Rice v. Sioux City Memorial Park Cemetery*, 75 S. Ct. 614, 349 U.S. 70, 99 L. Ed. 897.

II.

(a) Petitioners offered some evidence that duties assigned to the husband were of such magnitude that assistance was necessary for full performance, and that some wives rendered that assistance. This testimony was rebutted by proof that the work of a zanjero in all sixty-two divisions was substantially the same; that in some of those divisions the husband was not assisted in any manner by the wife; that some wives held full time jobs away from the home for other persons and therefore not in a position to assist their husbands; that in no instance did a zanjero or a wife request permission of Respondent for the wife to work for other persons or to leave the station at any time she chose and regardless of the length of absence. Some divisions were operated by unmarried men. Upon such evidence the lower court found that the assistance of a wife was not necessary to the efficient performance of a zanjero's duties. That if assistance was on occasion rendered by the wife, it was voluntary and not of benefit to Respondent.

These findings were strongly supported by the evidence. Findings of fact made by the trial judge in a case tried without a jury may not be set aside unless clearly erroneous. Rule 52 (a) Rules of Civil Procedure, 28 U.S.C.A.

Cleo Syrup Corp. v. Coca Cola Co.,
139 F. 2d 416

Blackhawk Hotels Co. v. Bonfoey,
227 F. 2d 232

Hycon Manufacturing Co. v. H. Koch & Sons,
219 F. 2d 353

(Certiorari denied 75 S. Ct. 881, 349 U.S. 953, 99 L. Ed. 1278.)

(b) Granting certiorari to review questions of fact does not accord with the practice of this Court.

United States v. Johnston,
268 U.S. 220, 227, 45 S. Ct. 496, 497, 69 L. Ed. 925

Houston Oil Co. v. Goodrich,
245 U.S. 440, 38 S. Ct. 140, 62 L. Ed. 385

Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 44 S. Ct. 164, 68 L. Ed. 412

Rogers v. Missouri Pacific R. R. Co.,
77 S. Ct. 459, dissent of Mr. Justice Frankfurter, dissent of Mr. Justice Harlan concurred in on this point by Mr. Justice Burton, Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Brennan and Chief Justice Warren.

CONCLUSION

The District Court and the Court of Appeals applied the correct rule of law. The findings made by the District Court were strongly supported by the evidence. In the final analysis the petition for writ of certiorari seeks to have this Court review questions of fact already settled.

It is respectfully submitted that no sound basis exists for granting certiorari.

Respectfully submitted,

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